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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re TYRA P., et al.,

Persons Coming Under the Juvenile Court Law.

B236091
(Los Angeles County
Super. Ct. No. CK87589)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

KIM W.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Jacqueline H. Lewis, Commissioner. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and
Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant
County Counsel, and Emery El Habiby, Deputy County Counsel, for Plaintiff and
Respondent.

INTRODUCTION

Kim W. appeals from the juvenile court's order removing her two children from her custody. She contends that there was insufficient evidence of harm or risk to them requiring their removal. We are not persuaded and therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Introduction*

Tyra (born in 1997) and Elijah (born in 1999) are the children of Kim W. (Mother) and Weldon P. (Father). Department¹ initiated this dependency proceeding in 2011 when it filed a section 300² petition seeking a declaration of juvenile court jurisdiction over Tyra and Elijah. However, in the preceding four years, Department had multiple contacts with this family based upon referrals of possible neglect or abuse. Because those contacts, including Mother and Father's repeated refusals to participate in any services to address the issues of neglect or abuse, constitute part of the juvenile court's rationale for removing the children from their parents' custody, we begin with a brief recitation of those antecedent events.

2. *Department's Prior Contacts with the Family*

In April 2007, Department received a referral claiming, among other things, that Tyra and Elijah were subject to general neglect by their parents.³ When

¹ The Los Angeles County Department of Children and Family Services.

² All undesignated statutory references are to the Welfare and Institutions Code.

³ The Child Abuse and Neglect Reporting Act, Penal Code section 11164 et seq. (CANRA) authorizes individuals to report suspected child abuse or neglect to designated

Department attempted to speak with Mother about the allegations, she “appeared very angry and was not receptive to anything the [social worker] was advising her of.” Department found the allegation of general neglect to be inconclusive “since it was unclear whether [Mother] was taking appropriate measures to alleviate the circumstances her children were describing.”

In March 2008, Department substantiated two separate allegations that Tyra was the victim of Mother’s general neglect. Department’s report stated that Mother “needs to be more protective of physical and verbal violence in [her] home with her children” but that “the referral was closed due to no contact from the parents.”

In October 2010, Department substantiated allegations that Tyra was the victim of general neglect and Elijah was at risk of general neglect from both parents. “The referral was promoted to a case to provide Voluntary Family Maintenance Services [but the] case was closed due to lack of compliance from the parents. The parents refused to participate in services.”

public agencies. (See, in general, *In re C.F.* (2011) 198 Cal.App.4th 454, 462-463.) A report about suspected abuse or neglect will be determined to be substantiated, inconclusive or unfounded. A substantiated report is one in which the investigator determines, “based upon evidence,” that it is “more likely than not that child abuse or neglect . . . occurred.” (Pen. Code, § 11165.12, subd. (b).) An inconclusive report is defined as one that the investigator determines “not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . occurred.” (Pen. Code, § 11165.12, subd. (c).) And an unfounded report is one “determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect.” (Pen. Code, § 11165.12, subd. (a).)

3. The Section 300 Petition

In March 2011,⁴ Department received the referral that led to the filing of the petition underlying this appeal. Department was informed that Father had physically and verbally abused Tyra. A social worker immediately went to the family's home. Father conceded he had hit Tyra but claimed he had done so because Tyra had lied and "disrespect[ed]" him and Mother. Mother stated that she and Tyra had a "verbal altercation" the prior day and that she had slapped Tyra after Tyra tried to strike her. Mother told the social worker about 13-year-old Tyra's misbehavior, which included failing all classes at school, smoking marijuana and going on a date with an 18-year-old man she had met on-line. The social worker interviewed the children in the presence of Mother and Father because the parents refused to permit a private interview. Tyra stated Father had hit her on the face and back with a belt; that Mother had thrown a "soda" at her; and that both parents verbally abused her. Elijah denied "all types of abuse." Neither child expressed fear of Mother.

On April 6, the social worker interviewed Tyra at school. Tyra said that the previous evening, she was doing her homework on the computer when Mother "snatched the computer" and yelled at her.

On April 8, the social worker visited the family at home. Father was hostile, stating the investigation was a waste of time. Father complained about Tyra's behavior and said he had hit her because "[s]he needs to stop being disrespectful to her mother and follow my rules." The social worker suggested counseling for the family. Mother replied: "I'm not doing counseling." Father likewise declined counseling, explaining: "The girl just needs to follow the rules of the home."

⁴ All subsequent dates refer to 2011.

When asked “how they felt about being in the home,” Tyra and Elijah “reported that they were ok.”

On April 18, the social worker telephoned the family. She explained that Department would offer services to the family. Mother responded that the family would not participate. Mother stated: “[Department] is wasting their time, the children aren’t being abused and [Department] needs to go help the other children [that] are being abused.” Mother then hung up the phone. The social worker called back and spoke with Father. Father, who conceded he “spank[s] [Tyra] every now and then,” refused Department’s offer of services and hung up the phone.

On April 28, Department filed the section 300 petition. That day, the juvenile court conducted a detention hearing and found a prima facie case to detain both children. The court ordered conjoint counseling and directed Department to provide referrals to the parents for parenting and individual counseling. Mother’s attorney indicated that Mother had health insurance with Kaiser and that she would set up family counseling through Kaiser.

On May 12, the social worker telephoned Mother to discuss the petition. Mother responded: “I know about the petition, I don’t need to go over the petition.” Mother said portions of Department’s report were untrue. When the social worker asked her what was untrue, Mother hung up the phone. Five days later, the social worker left a message for Mother but Mother did not return the call.

On June 28, the social worker telephoned Mother. Mother screamed at her, would not allow her to complete a sentence, and hung up the phone.

On July 20, the juvenile court conducted the adjudication hearing. It sustained the petition under section 300, subdivisions (b) and (j), failure to protect and abuse of a sibling. The court found:

“The child Tyra . . . has displayed some behavioral issues and her parents, Weldon [P.] and Kim [W.] have responded inappropriately. The father has on multiple occasions disciplined Tyra by striking her with a belt and his hands on her face and back. He has yelled at her and called her names. Mother has also yelled at Tyra and has not protected her from her father’s physical discipline. The parents’ inappropriate responses to Tyra also place the child Elijah at risk.”

The court ordered the children detained in the home of a maternal aunt where they had been placed earlier.

The court set a contested disposition hearing for the next month. It indicated that its “tentative [decision], if nothing has changed between now and that date, is to suitably place these children.” The court explained: “What is clear to me, at least, is the parents aren’t going to do a darn thing. And that includes getting their child [Tyra] into counseling. . . . [¶] [W]e have tried for months here to get the parents to cooperate, to provide the services that their children need; to get the services they need. And they have told us over and over and over again they are not interested.” The court ordered Mother to obtain counseling both for Tyra and herself. Mother’s attorney indicated she was “willing to be in counseling with Tyra.”

4. The Disposition Hearing

On August 19, the juvenile court conducted the disposition hearing. The social worker testified as follows. The previous day she visited Mother and Father at their home. Father was agitated and angry, denied that there was any problem, claimed that Department’s reports had lied about him, refused to participate in any counseling services, and stated he would continue to discipline Tyra. Mother indicated she was willing to participate in court-ordered services. She agreed to

call Kaiser to set up a counseling appointment and told the social worker that she would call her later that day with the details of the appointment. However, the social worker never received a call or voice message from Mother confirming that the appointment had been made.

In addition, the social worker testified that she was concerned about the two children's well-being because "physical discipline has been used in the home and that [Mother and Father] refused any remedial services. And they refused to put Tyra in counseling [when] Tyra's behavior is described as the reason for the physical discipline. So they aren't addressing Tyra's behaviors which result from the discipline, which the Department feels will escalate, will continue to escalate and therefore increase the risk to the children for further physical discipline."⁵

On the issue of Tyra receiving counseling, Mother's attorney told the court: "Mother made an appointment for Tyra August 30 with Kaiser."

⁵ On August 17 (two days before the disposition hearing), Department filed a "last minute information" report with the court. In relevant part, it stated: "It is [Department's] assessment . . . that there is risk to the children Tyra and Elijah [P.] of further physical abuse due to the parents' use of inappropriate physical discipline. Furthermore, the parents have not been allowing access to the children and have not been receptive to alternative forms of discipline or services. On several occasions, [Department] has called the parents and when the mother has answered the phone, she has yelled at the [social worker] and refused to speak with her. Additionally, on 08/10/2011, [a social worker] arrived unannounced to the home which was answered by father Weldon [P.]. He refused to let the CSW in and denied that there was a court or [Department] case. [Department] has written a letter to the parents explaining their involvement and need for compliance to no avail. The parents have not been compliant in that the child Tyra has not been enrolled in counseling services to the knowledge of [Department] in order to address the behaviors, which resulted in the inappropriate physical discipline she receives. Father also has stated that he plans to continue to use physical discipline. Moreover, this family has received a total of five referrals alleging physical abuse by father since 2007. [Department] has attempted to provide the parents with remedial services but the parents have refused. Therefore, it is the assessment of [Department] that there is risk of the child's behaviors resulting in continual physical discipline and that physical discipline, escalating."

In making its ruling, the court examined in detail the history of Department's interactions with this family since 2007 before concluding:

“What I see here is three years plus, almost four years, of physical, emotional abuse of these children; the department walking away when the parents wouldn't comply.

“This court, the department, has bent over backwards for the last six months, trying to give this family every opportunity to work together, to get some services in place to make sure these kids were safe. And here we are today, and nothing has happened.

“The court finds, by clear and convincing evidence, that there is a substantial risk of detriment for these children to remain in this home with these parents, when the parents refuse to do anything to stop it. And I think we, as a system, have completely failed these children to allow these children to endure this for four years, without stepping in to do anything about it.” (Italics added.)

“There is a substantial danger, if the children were to return home, to their physical health, safety, protection, or physical or emotional well-being.

“There are no reasonable means to protect the children without removal from their parents' physical custody.

“The court orders the children removed from their parents and finds that reasonable efforts were made to prevent the need for removal.”

The court ordered reunification services for both parents including counseling for Mother to address issues of parenting and child protection, anger management for Father, and counseling for Tyra.

This appeal by Mother follows.⁶

⁶ Father is not a party to this appeal.

DISCUSSION

In this appeal, Mother does not contest the assertion of juvenile court jurisdiction over her two children. Instead, she challenges only the trial court's dispositional order removing the children from her custody. She argues that "[t]here was insufficient evidence of harm or risk to the children requiring their removal from [her]." We disagree.

Section 361, subdivision (c)(1) provides that a child shall not be taken from the physical custody of a parent unless the juvenile court finds by clear and convincing evidence that there is "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor . . . and there are no reasonable means by which the minor's physical health can be protected without removing the minor" from the parent's custody. However, "[t]he parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136.) The juvenile court can consider a parent's past conduct as well as the present circumstances. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 900.) The court is not limited to the contents of the sustained section 300 petition when it considers the appropriate disposition. The court may consider "common facts of family history and behavior[] that shed light on the charged conduct alleged in [the] sustained petition[.]" (*In re Rodger H.* (1991) 228 Cal.App.3d 1174, 1183; see also § 358, subd. (b).) In sum, "[t]he juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order. [Citation.]" (*In re Javier G.* (2006) 137 Cal.App.4th 453, 462.)

Mother correctly notes that in the trial court, clear and convincing evidence of parental neglect is required to remove a child from a parent's custody. However, "on appeal the proper standard of review is the substantial evidence rule.

‘In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent [here, Department] and all legitimate inferences indulged in to uphold the [trial court’s removal order], if possible. Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deduction for those of the trier of fact’ [Citations.]” (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214; see also *In re Henry V.* (2004) 119 Cal.App.4th 522, 529 [““[T]he substantial evidence test applies to determine the existence of the clear and convincing standard of proof.””].)

Substantial evidence supports the trial court’s ruling that removal of Tyra and Elijah was required because they were at a substantial risk of harm if returned home. Both parents physically abused Tyra. Father hit her on multiple occasions with his hand or belt and stated he would continue to do so. Mother did nothing to prevent Father’s physical abuse of Tyra, and, in fact, admitted that she had slapped Tyra during an argument. In addition, both parents subjected Tyra to verbal abuse by calling her names and yelling at her and both had refused Department’s multiple offers to participate in counseling and to place Tyra in counseling. Lastly, even before this petition was filed, Mother and Father had an extensive history with Department. Referrals of “general neglect” were substantiated in 2008 and 2010 but in no instance did Mother or Father agree to participate in any services to ameliorate the situation. Based upon all of these circumstances, the trial court could reasonably conclude that Father would continue to physically abuse Tyra; that Mother would fail to protect Tyra from those assaults by Father; that Mother would persist in verbally abusing Tyra; and that this volatile and dysfunctional

family situation would put Elijah, Tyra's younger brother, at risk, thereby requiring both children to be removed from the home.

Mother's contrary arguments are not persuasive. She places great reliance upon the fact that, as represented by her attorney at the August disposition hearing, she had finally made a counseling appointment for Tyra. Given that Mother had failed to make this appointment in any of the preceding three months although the court had ordered her to do so at the May detention hearing and that the appointment was made (apparently) right before the disposition hearing, the court was entitled to give this fact little, if any, weight. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53 [it is the juvenile court's exclusive role to assess and decide the credibility of a witness and to weigh the value of evidence].) Further, a counseling appointment for Tyra did not address the core issues of Mother's physical and verbal abuse of Tyra and her failure to protect Tyra from Father's physical abuse. Similarly, the facts that the children in two interviews with the social worker did not indicate they wished to be removed from the home or that that the children's attorney argued at the disposition hearing that the children should not be removed from the home does not change our conclusion.⁷ Essentially, Mother is asking us to reweigh the evidence and substitute our judgment for that of the juvenile court. We decline to do so. (*Ibid.*)

⁷ We note that the children's attorney acknowledged a point pivotal to the juvenile court's order when she stated: the "parents' lack of cooperation and refusal of services causes me concern."

DISPOSITION

The juvenile court's August 19, 2011 order removing Tyra and Elijah from appellant Kim W.'s custody is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.